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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the matter of | ) | |
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| Implementation of Section 207 of the Telecommunications Act of 1996 | ) | CS Docket No. 96-83 |
| | ) | |
| Restrictions on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Service | ) | |

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# COMMENTS OF THE NETWORK AFFILIATED STATIONS ALLIANCE


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## SUMMARY

The Commission must implement Section 207 of the 1996 Act as Congress intended by prohibiting State, local or private regulations that adversely affect the ability of consumers to use rooftop antennas and other reception devices to view free, over-the-air television. The Commission can achieve this result by adapting the regulations already in place for small satellite dishes to over-the-air antennas.

The Commission first should recognize that Congress expressed its intent plainly. It chose wording that requires preemption of regulations that "impair" reception of over-the-air signals, not just regulation that "prevents" reception. This meaning is confirmed by the legislative history of the 1996 Act.

The Commission can comply with this Congressional mandate by adapting the rule that now governs small satellite dishes. The rule for over-the-air antennas should preempt all regulations that impair erection of rooftop antennas; it should not permit aesthetic regulations; and it should not restrict the size or shape of antennas. Private regulations of over-the-air antennas should be prohibited, and municipalities should bear a heavy burden if they request waiver of the rules.

The Commission also should assure regulatory parity between over-the-air antennas and DBS dishes. The language of Section 207 shows that Congress intended to maintain regulatory parity. Moreover, regulatory parity will enhance competition and maximize consumer choice in video programming.

## TABLE OF CONTENTS

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| | | |
|---|---|---|
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| | ) | |
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## COMMENTS OF THE NETWORK AFFILIATED STATIONS ALLIANCE

The NBC Television Affiliates Association, the CBS Television Affiliates Association and the ABC Television Affiliates Association (together, the "Network Affiliated Stations Alliance" or "NASA") hereby submit their comments in response to the notice of proposed rulemaking in the above-referenced proceeding.[1/] NASA supports full implementation of the provisions of Section 207 of the Telecommunications Act of 1996.[2/] As shown below, Section 207 requires rules that provide consumers with unimpaired access to over-the-air broadcast signals. The Commission can implement this goal by adapting rules adopted for small satellite dishes to antennas used to receive over-the-air television signals. It also is important for the Commission to maintain regulatory parity between over-the-air antennas

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1/ Implementation of Section 207 of the Telecommunications Act of 1996, *Notice of Proposed Rulemaking*, CS Docket No. 96-83, rel. Apr. 4, 1996 (the "Notice").

2/ Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56 (1996) (the "1996 Act") § 207.

and antennas used for competitive services so that consumers may choose freely among video delivery options.

## I. The 1996 Act Requires the Commission to Adopt Rules that Grant Television Viewers the Legal Right to Use Rooftop Antennas to Improve Reception of Over-the-Air Television Signals.

Section 207 of the 1996 Act directs the Commission to "promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception." 1996 Act § 207. The Commission must follow this mandate and adopt rules that ensure the ability of all television viewers to use conventional rooftop antennas to receive television signals. This approach is consistent with the intent of Congress, as expressed in both the statutory language and the legislative history.

In discerning Congressional intent, the Commission should be mindful of how Congress defined the scope of the Commission's regulatory obligation. The statute requires that the Commission "prohibit restrictions that *impair*" the ability to receive over-the-air broadcast signals. *Id.* (emphasis added). This choice is significant. "Impair" means "to damage or make worse" or "injure."[3/] It is not synonymous with "prevent" or "eliminate." Thus, based on the plain meaning of Section 207, it is evident that Congress intended for the

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3/ MERRIAM-WEBSTER, WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 603 (1987); *see also* BLACK'S LAW DICTIONARY 677 (5th ed. 1979) ("To weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner").

Commission to adopt rules that prohibit local authorities from adopting regulations that impair the ability of consumers to use antennas to receive over-the-air signals.

Where the plain meaning of a provision is evident, there is no need for recourse to legislative history.[4/] Nevertheless, the legislative history of the 1996 Act confirms that Congress intended the Commission to do more than merely prevent prohibitions on over-the-air reception devices. The portion of the conference report in the 1996 Act that discusses Section 207 explains that this provision is intended to apply to restrictions that "inhibit" reception of over-the-air broadcast signals.[5/] This language is consistent with the plain meaning of Section 207 and does not support a different interpretation. Thus, the only construction of Section 207 for which there is support -- both in the text and the legislative history — is that the Commission must adopt regulations that protect consumers from regulations that adversely affect their ability to erect and maintain antennas to receive over-the-air broadcast signals.

In addition, Section 207 does not contain any exceptions that would permit States, municipalities or private organizations to impose any form of burdensome regulation on consumers. The legislative language is direct: the Commission must "promulgate regulations to prohibit restrictions." 1996 Act § 207. The statute does not leave room for State, local or private inquiries into whether a consumer "needs" an over-the-air antenna.

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4/ *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984) ("If the intent of Congress is clear, that is the end of the matter").

5/ H.R. REP. NO. 458, 104th Cong., 2d Sess., at 166 (1996).

Nor does the statute permit States to invoke any process that could otherwise impair a consumer's capability to receive over-the-air broadcast signals.

## II. The Rules Adopted for Small Satellite Dishes Should Be Adapted to Over-the-Air Television Antennas.

The Commission addressed similar issues affecting reception of direct broadcast satellite ("DBS") signals in its satellite earth station zoning proceeding.[6/] The Notice proposes to use the rules adopted in that proceeding for small satellite dishes, including DBS dishes, as the basis for the rules in this proceeding. Notice at ¶ 6. As described below, NASA supports the Commission's proposal. The proposed small satellite dish rules provide an appropriate model for rules governing over-the-air reception devices so long as they are adapted to the specific requirements of over-the-air broadcasting. The Commission also should adopt a rule that prohibits all private restrictions on over-the-air antennas and should place the burden of justifying any regulation on the regulator, not the consumer.

First, it is important for the Commission to apply the basic principles of the rules adopted in the DBS Dish Order to over-the-air antennas. Thus, consistent with those principles, all regulations that adversely affect the use of over-the-air antennas should be presumed unreasonable. The strength and clarity of the Congressional mandate described above supports a presumption that local regulations that interfere with the use of roof-top antennas violate Section 207. In addition, presuming that such a regulation is unreasonable

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6/ Preemption of Local Zoning Regulation of Satellite Earth Stations, *Report and Order and Further Notice of Proposed Rulemaking*, IB Docket No. 95-59, DA 91-577, 45-DSS-MISC-93, rel. Mar. 11, 1996 (the "DBS Dish Order").

appropriately places the burden of proof on regulators, who are likely to have more resources to justify their conduct than consumers trying to maximize their reception of television signals.

The Commission also should adopt the rule that restrictions based on aesthetic grounds are unreasonable for over-the-air antennas. DBS Dish Order at ¶¶ 26-27. This rule is particularly important for over-the-air broadcast antennas because many "aesthetic" restrictions reduce the effectiveness of antennas. For instance, requiring antennas to be placed in the attic of a house rather than on the roof adversely affects the ability of the antenna to receive broadcast signals. Similarly, requiring that antennas somehow be shielded from view diminishes if it does not destroy completely the effectiveness of antennas to receive broadcast signals. (Indeed, any covering will reduce the effectiveness of an over-the-air antenna.) Thus, without complete preemption of aesthetic regulations, many consumers likely will be subjected to regulations that prevent them from receiving local broadcast signals they should be able to receive, or that impair the quality of reception.

The Commission also should recognize that over-the-air antennas pose no special safety risks that would require regulation different than that for small satellite dishes. There have now been decades of experience in the design and construction of rooftop over-the-air antennas. This experience shows that over-the-air antennas pose little danger and, like small satellite dishes, there is no reason to believe they are any more dangerous than the structures on which they are placed. *See* DBS Dish Order at ¶ 35. Consequently, there is no reason to impose different safety regulations on over-the-air antennas than on small satellite dishes.

There are, however, some areas in which the Commission should modify the small satellite dish rule to adapt it to the specific requirements of over-the-air antennas. First, the Commission should not limit the size or shape of the over-the-air antennas covered by the new rule. Over-the-air antennas have been developed over the years to meet a wide variety of specific consumer needs. In some areas, larger antennas are necessary because of terrain features or the distance from specific television stations. Antenna designs also vary widely, again depending on the requirements of the consumer using them. At the same time, neither the industry nor the Commission can predict the size or shape of antennas for advanced television (ATV) when they begin to reach the marketplace in the next few years. Consequently, it would be imprudent for the Commission to restrict the coverage of its rules for over-the-air antennas to any specific sizes or types of antenna design.

Second, the Commission should expand the scope of the rule to encompass restrictions imposed by private entities such as homeowners associations. Restrictions on consumers' uses of their homes often come from restrictive covenants or design review requirements imposed privately through homeowners associations or similar groups. Many times, these restrictions govern external modifications to a home, including over-the-air antennas. Moreover, private restrictions often are based specifically on aesthetic grounds alone, not on health or safety concerns. In many cases, they may be more difficult to challenge than municipal regulations because there are no requirements for due process or other procedural protections. In this context, it is unsurprising that the legislative history of the 1996 Act indicates that Section 207 was intended to address the problems created by

private regulations: The House report on the language that became Section 207 states that "[e]xisting regulations, including but not limited to . . . restrictive covenants or homeowners' association rules, shall be unenforceable to the extent contrary to this section."[7/] Thus, Congressional intent requires the adoption of rules that prohibit all private restrictions on over-the-air reception devices.

Adopting a presumption that such private restrictions are illegal would greatly ease a growing burden on consumers and the potentially significant burden on the Commission that would arise from case-by-case adjudication of disputes over private restrictions. To the extent that current private restrictions have a legitimate purpose not inconsistent with Section 207, homeowners' associations or other groups can petition local governments to adopt regulations that achieve that purpose. The record that would be created in that process would be far better suited to Commission review than the decisions of private entities made without due process obligations.

Finally, to the extent that the Commission allows municipalities or States to seek waivers of its regulations concerning over-the-air reception devices, the burden of proof in those proceedings should be on the regulator, not consumers. Regulators should bear a heavy burden to demonstrate, clearly and convincingly, that their regulations serve an important purpose and are not inconsistent with the purposes of Section 207.[8/] This is a fair

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7/ H.R. REP. NO. 204, 104th Cong., 1st Sess., at 124 (1995); *see also* DBS Dish Order at ¶ 56 (quoting the House Report).

8/ There should be no waiver provision available to homeowners associations and other private groups. As described above, these entities should be required to make their

allocation of the burdens of obtaining a waiver in light of the expressed Congressional intent to prohibit "restrictions that impair a viewer's ability to receive video programming[.]" 1996 Act § 207. In addition, given the likely disparity in resources between an affected consumer and a municipality seeking to justify limitations on over-the-air reception devices, it is appropriate to put the burden of proof on the municipality rather than the consumer.

## III. The Commission Should Maintain Regulatory Parity Between Over-the-Air Antennas and Antennas Used by Competing Satellite Services.

Maintaining regulatory parity between over-the-air antennas and antennas used by satellite services that compete with television broadcasters is an important element in the Commission's implementation of Section 207 The Commission should seek regulatory parity because it is necessary to prevent a competitive imbalance between satellite providers and their competitors and to avoid depriving consumers of access to over-the-air network programming.

Balanced relief for satellite services and broadcasters is appropriate because regulatory parity is the best way to create fair competition. Congress apparently intended such a result in the implementation of Section 207 because it expressed no preference between DBS services and over-the-air broadcasters. *See* 1996 Act § 207 (applying prohibition on impairment of reception to both broadcast and DBS services). Regulatory parity will let the marketplace decide which technologies and services will be most successful.

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case to local authorities, not the Commission.

Regulations that implement Section 207 substantially similarly for over-the-air broadcasters and DBS providers are necessary if free over-the-air broadcasting is to compete successfully with DBS. If the Commission adopts its proposed rules for DBS (which essentially preempt all restrictions on DBS dishes) but adopts substantially different rules for over-the-air antennas, some portions of the potential broadcast audience literally would be deprived of the opportunity to obtain free television. Consumers may have no choice but to turn to alternative pay services, including DBS and cable television, for video programming. This is not the result that Congress intended and would be inconsistent with the Commission's longstanding commitment to free, over-the-air broadcasting.

## IV. Conclusion

Congress has given the Commission clear direction for the implementation of Section 207. The Commission should follow that direction by adopting rules that prevent States, municipalities and private entities from restricting the use of rooftop antennas and other over-the-air reception devices. The Commission can model its rules on those now in place for small satellite dishes, with certain modifications to adapt them to the requirements of over-the-air antennas. Doing so will assure regulatory parity between satellite services and free, over-the-air broadcasting and will maximize consumer choice in video programming. For all

of these reasons, the Network Affiliated Stations Alliance urges the Commission to adopt rules in accordance with these comments.

Respectfully submitted,

THE NETWORK AFFILIATED STATIONS ALLIANCE

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May 6, 1996

## CERTIFICATE OF SERVICE

I, Tammi A. Foxwell, a secretary at the law firm of Dow, Lohnes & Albertson, do hereby certify that on this 6th day of May, 1996, I caused copies of the foregoing "Comments of The Network Affiliated Stations Alliance" to be served via hand-delivery to the following:

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